97-9361

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

LOUIS JONES, JR.
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Capital Case)

IRA R. KIRKENDOLL
Federal Public Defender
Northern District of Texas

BY: TIMOTHY CROOKS
Asst. Federal Public Defender
600 Texas St., Suite 100
Fort Worth, TX 76102-4612
(817) 978-2753
LA State Bar No. 17541

TIMOTHY W. FLOYD
Texas Tech University School of Law
18th & Hartford
Lubbock, TX 79409
(806) 742-3982
TX State Bar No. 07188405

ATTORNEYS FOR PETITIONER LOUIS JONES, JR.

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CAPITAL CASE

QUESTIONS PRESENTED

I. **Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?**

SUBSIDIARY QUESTIONS:

Did the Fifth Circuit err when it held that a deadlocked sentencing jury would result in a new sentencing hearing, contrary to the plain wording of 18 U.S.C. § 3594 and the holding of the United States District Court for the District of Colorado in United States v. Nichols, 1998 WL 2518 (D.Colo., Jan. 7, 1998)?

Is an instruction on the effect of nonunanimity in capital sentencing proceedings required by due process and the Eighth Amendment?

II. **Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?**

SUBSIDIARY QUESTION: Does the erroneous injection of a nonexistent less-than-life sentencing alternative into the sentencing jury's deliberations violate due process under this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980), and the Eighth Amendment requirement of reliability in capital sentencings?

III. **Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?**

IV. **Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?**

SUBSIDIARY QUESTION: Under § 3595, must each issue raised by a death-sentenced individual be individually and specifically addressed in the written opinion of the Court of Appeals?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed January 5, 1998, as to which rehearing was denied on March 4, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals, United States v. Louis Jones, Jr., is published at 132 F.3d 232. A copy of the West slip opinion is attached as Appendix A. A copy of the unpublished order of the Fifth Circuit denying rehearing is attached as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on January 5, 1998. The Court of Appeals denied rehearing on March 4, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 18 U.S.C. § 3291. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3595(a), and 18 U.S.C. § 3742.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sentence of death in this case was imposed pursuant to the Federal Death Penalty Act of 1994, which is codified at 18 U.S.C. §§ 3591-3598 (Appendix C). The due process guarantee at issue in the first two questions presented is contained in the Fifth Amendment to the United States Constitution, which is set forth in Appendix D. The first three questions presented also implicate the Eighth Amendment to the United States Constitution, which is set forth in Appendix E.

STATEMENT OF THE CASE

A. Proceedings Below

On March 7, 1995, Petitioner Louis Jones, Jr., was indicted in a two-count indictment charging 1) kidnapping within the special maritime and territorial jurisdiction of the United States, resulting in the death of Tracie Joy McBride, in violation of Title 18, United States Code, Sections 7(3) and 1201(a)(2) (Count 1), and 2) assault of Michael Alan Peacock within the maritime and territorial jurisdiction of the United States, resulting in serious bodily injury, in violation of Title 18, United States Code, Sections 7(3) and 113(f) (Count 2).

On September 13, 1995, the government gave notice of its intention to seek the death penalty in the event Petitioner was convicted of the offense charged in Count 1.

On October 16 through October 23, 1995, Petitioner was tried by jury before the United States District Court for the Northern District of Texas, Lubbock Division. On October 23, 1995, the jury returned a verdict of guilty against Petitioner on both counts.

On October 24 through November 3, 1995, a separate sentencing hearing was held before the same jury that decided guilt/innocence. On November 3, 1995, the jury returned a verdict of death on Count 1, and the District Court entered judgment on that verdict. After a timely motion for new trial was denied, Petitioner filed a timely Notice of Appeal as to the judgment on Count 1.

Meanwhile, the noncapital offense charged in Count 2 proceeded through the usual steps of preparation of a presentence report and objections. On April 12, 1996, the District Court sentenced Petitioner to 57 months imprisonment on Count 2, to run concurrently with any period of confinement Petitioner served while awaiting imposition of the death penalty imposed on Count 1.

The District Court also sentenced Petitioner to two years supervised release. Petitioner filed a timely Notice of Appeal as to the judgment entered on Count 2.

Both appeals were consolidated and heard before the United States Court of Appeals for the Fifth Circuit. That court affirmed Petitioner's convictions and his sentence of death. See United States v. Jones, 132 F.3d 232, 253 (5th Cir. 1998) (Appendix A). The Court of Appeals also denied Petitioner's timely petition for rehearing. See Appendix B.

B. Statement of Relevant Facts

On February 18, 1995, Tracie Joy McBride, a 19 year old white female private stationed at Goodfellow Air Force Base, was kidnapped from a laundry room on base by a black male.[1] Her kidnapping remained unsolved for two weeks until Petitioner became a suspect in the case on March 1, 1995. After being taken into custody on an unrelated charge, Petitioner gave a statement in which he admitted abducting Tracie McBride and taking her to his residence in San Angelo. Petitioner admitted that in the early morning hours of February 19, 1995, he drove McBride to a remote location, where he struck her over the head several times with a tire iron, killing her. He then left her body under a bridge.

After he had made his statement, Petitioner led law enforcement authorities to the location of McBride's body. An autopsy concluded that the cause of McBride's death was blunt force trauma to the head. The autopsy also found vaginal bruises consistent with a sexual assault.

Petitioner's case was the first in the country in which the United States sought to seek the federal death penalty under the then-newly enacted Federal Death Penalty Act of 1994 ("FDPA"),

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[1] While in the process of abducting McBride, this black male also assaulted one Private Michael Peacock, who was attempting to foil the abduction. This assault became the basis of Count 2 against Petitioner.

codified at 18 U.S.C. §§ 3591-3598 (Appendix C). The United States gave notice of its intent to seek the death penalty, and specified four statutory aggravating factors[2] and three nonstatutory aggravating factors[3] which it would attempt to prove in order to qualify Petitioner for the death penalty.

After Petitioner was found guilty of the kidnapping, the case proceeded into the separate sentencing hearing called for by the FDPA. After the government presented its case on aggravation, the defense proceeded to put on an extensive case in mitigation. The defense showed that Petitioner

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[2] These factors -- taken from the list of statutory aggravating factors found in 18 U.S.C. § 3592(c) -- were as follows:

> 2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping.
>
> 2(B). The defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride.
>
> 2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride.
>
> 2(D). The defendant LOUIS JONES committed the killing of Tracie Joy McBride after substantial planning and premeditation to cause the death of Tracie Joy McBride.

[3] These factors -- drafted by the prosecutor pursuant to authority purportedly granted in §3592(c) -- were as follows:

> 3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant LOUIS JONES.
>
> 3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.
>
> 3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

had risen from a childhood background of severe physical and sexual abuse and neglect to become a successful noncommissioned officer in the United States Army. During his 22 year Army career, Petitioner served with distinction in the Army Airborne Rangers in both the Grenada conflict and the Gulf War. Petitioner rose through the ranks and was decorated several times.

The defense also showed how Petitioner's life fell apart after Petitioner retired from the Army in 1993 -- which sacrifice he made in order to be together with his then-wife Sandy Lane. After his retirement, Petitioner went from being a highly-regarded, successful military professional, to a series of failed attempts to go back to college, and minimum wage jobs which did not even enable Petitioner to support his family. This decline in Petitioner's fortunes took its toll on his marriage, and eventually destroyed the marriage altogether.

On the critical date -- February 18, 1995 -- Petitioner's ex-wife, Sandy Lane, made a final break with Petitioner, informing him that there was no chance that they could ever have a future together again. Crazed with grief and desperation at the death of his marriage, and under the influence of alcohol, Petitioner went in search of Sandy on base, where he thought she might be on duty. Unfortunately, he found Tracie McBride, who bore a strong physical resemblance to Sandy.

The defense presented extensive expert psychiatric and psychological testimony to show that Petitioner's ability to control his impulses and to act rationally had, on the date of the offense, been severely compromised.[4] The break with Sandy had simply been the trigger which -- coupled with Petitioner's childhood sexual and physical abuse, posttraumatic stress disorder from witnessing killings during combat in Grenada and from stressful combat conditions during the Gulf War with

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[4] Testimony showed that Petitioner suffered from impairment of the frontal lobe of the brain, the part of the brain attributed with rational decisionmaking and impulse control.

numerous physical manifestations, numerous severe head injuries, and the loss of the organizing structure of the Army -- sent Petitioner over the edge.

The jury did not find two of the statutory aggravating factors submitted: 2(B) (that Petitioner caused a grave risk of death to another person) and 2(D) (that Petitioner committed the killing after substantial planning and premeditation). The jury did make an affirmative finding that the other two statutory aggravating factors -- 2(A) and 2(C)[5] -- had been proven beyond a reasonable doubt.

The jury failed to find nonstatutory aggravating factor 3(A); that is, they did not find that Petitioner constituted a future danger to the lives and safety of other persons. The jury did make affirmative findings as to the other two factors, 3(B) and 3(C).[6]

Furthermore, the jury was obviously impressed by Petitioner's mitigation case since one or more jurors found 11 mitigating factors to exist:

1. That Petitioner did not have a significant prior criminal record;

2. That Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law was significantly impaired;

3. That Petitioner committed the offense under severe mental or emotional disturbance;

4. That Petitioner was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed);

5. That Petitioner served his country well in Desert Storm, Grenada, and for 22 years in the United States Army;

6. That Petitioner is likely to be a well-behaved inmate;

7. That Petitioner is remorseful for the crime he committed;

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[5] See footnote 2, supra.

[6] See footnote 3, supra.

8. That Petitioner's daughter will be harmed by the emotional trauma of her father's execution;

9. That Petitioner was under unusual and substantial internally generated duress and stress at the time of the offense;

10. That Petitioner suffered from numerous neurological or psychological disorders at the time of the offense.

Additionally, seven jurors "wrote in" "Sandy Lane" -- Petitioner's ex-wife -- as a mitigating circumstance.

After the jury returned its verdict of death, two events occurred which showed that the jury had labored under a fundamental misunderstanding of the consequences of their actions. First, on November 8, 1995, only five days after the jury returned its verdict, juror Christie Beauregard, who had misgivings about the verdict, contacted the defense and let them know the following facts about what had happened during the jury's deliberations:

1. The jury was originally hung 8-4 in favor of death;

2. The jury believed that if it was hung and unable to produce a unanimous verdict for death or life without release, then the judge would impose a "lesser sentence" on Petitioner -- which no one wanted;

3. The pressure mounted when the vote became 10-2, with only Beauregard and Cassandra Hastings holding out for life; and

4. Succumbing to the pressure of the group -- **and based on their belief that a hung jury would result in a less-than-life sentence for Petitioner** -- Beauregard and Hastings caved in, and voted for death.

Beauregard also indicated that, if the jurors had known that nonunanimity would not result in a less-than-life sentence, she and (she believed) several others would not have agreed to vote for a death sentence. (Beauregard's remarks were memorialized in a sworn affidavit by investigator Daniel Salazar, who, along with one of the defense attorneys, participated in the telephone conversation with Beauregard. Salazar's affidavit is attached at Appendix H.)

Not long after that, juror Cassandra Hastings, who also had misgivings about the verdict, also contacted the defense. As a result, she executed an affidavit which is attached at Appendix I. In addition to corroborating much of what Beauregard had said, Hastings stated that all but three jurors were willing to vote to impose a sentence of life without release on Petitioner. However, the refusal of these three even to consider life without release caused the jury to realize it would be hung.

Like Beauregard, Hastings also changed her vote to death under her belief that jury nonunanimity would result in a less-than-life sentence for Jones. Hastings stated that she would not have changed her vote, had it not been for this mistaken belief.

The remarks of Beauregard and Hastings made it crystal clear that the specter of a "lesser sentence" -- which, this jury believed, would be imposed by the court as the result of a hung sentencing jury -- had been the driving force behind this jury's decision to sentence Petitioner to death.

REASONS FOR GRANTING THE WRIT

I. Was Petitioner's death sentence imposed in violation of due process and the Eighth Amendment to the Constitution, where the District Court refused to instruct the jury that the result of nonunanimity in the sentencing phase would be the imposition of a sentence of life without release or parole?

SUBSIDIARY QUESTIONS:

Did the Fifth Circuit err when it held that a deadlocked sentencing jury would result in a new sentencing hearing, contrary to the plain wording of 18 U.S.C. § 3594 and the holding of the United States District Court for the District of Colorado in United States v. Nichols, 1998 WL 2518 (D.Colo., Jan. 7, 1998)?

Is an instruction on the effect of nonunanimity in capital sentencing proceedings required by due process and the Eighth Amendment?

In this case, once the jury returned its verdict of guilty on the kidnapping charge against Petitioner, there were only two possible sentencing outcomes: death, or life imprisonment without release or parole. The federal kidnapping statute under which Petitioner was convicted, 18 U.S.C. § 1201, provides that one who commits a kidnapping within the special maritime and territorial jurisdiction of the United States "shall be punished by imprisonment for any term of years or for life

and, **if death results, shall be punished by death or life imprisonment.**" 18 U.S.C. § 1201 (emphasis supplied).

In the trial as to guilt/innocence, the jurors in this case were instructed that, in order to convict Petitioner of the crime charged, they had to find, beyond a reasonable doubt, "[t]hat the death of Tracie Joy McBride resulted [from the kidnapping]." Thus, the jury's verdict of guilty represented a finding, beyond a reasonable doubt, of "death result[ing]," thereby limiting the possible punishments to either death or life imprisonment. A lesser sentence than life imprisonment was no longer a possibility by the time the sentencing hearing began.

Moreover, because parole has been abolished in the federal system[7], and because a person subject to a life sentence is not eligible to receive "good time,"[8] "life imprisonment" means what it says -- that the person will never get out. Therefore, as the jury went into the sentencing hearing, there were only two options: death, or life imprisonment which was, perforce, without the possibility of parole or release.

Furthermore, a "mistrial" and a new sentencing hearing are not permissible options where the sentencing jury "hangs" or deadlocks as to the appropriate punishment. This is made clear by 18 U.S.C. § 3594, which provides in relevant part as follows: "Upon a [unanimous] recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. **Otherwise, the court shall impose any lesser sentence that is authorized by law.**" 18 U.S.C. § 3594 (emphasis added).

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[7] The provisions for federal parole were repealed effective November 1, 1987, see Pub. L. 98-473, tit. II, ch. II, § 218(a)(5), although the repeal applied only to offenses committed after that effective date. See id. at § 235(a)(1), codified at Historical and Statutory Notes to 18 U.S.C. § 3551.

[8] A prisoner serving "a term of imprisonment for the duration of the prisoner's life" is not eligible for sentence credit for satisfactory behavior. See 18 U.S.C. § 3624(b)(1).

This statute clearly provides that, one way or another -- with jury unanimity or not -- the defendant will receive some kind of sentence after the first sentencing hearing. This reading clearly forecloses the possibility of a "mistrial" and a new sentencing hearing. Thus, under § 3594, as applied to this case, there were only two possible outcomes in this case:

1. Death, upon unanimous vote of the jury for such penalty, see 18 U.S.C. § 3593(e); or
2. Life imprisonment without the possibility of parole or release, either
   a. Upon unanimous vote of the jury for such penalty, see 18 U.S.C. § 3593(e); or
   b. By operation of law under the second sentence of § 3594, by virtue of a nonunanimous jury.

Consequently, a failure by the jury to unanimously vote for the death penalty in this case would have resulted in a sentence of life imprisonment without the possibility of parole or release for Petitioner.[9]

The Fifth Circuit agreed that, in this case, there were realistically only two sentencing alternatives for Petitioner: death, or life without release. Jones, 132 F.3d at 248. However, the Fifth Circuit disagreed with Petitioner's argument about the effect of a nonunanimous sentencing jury:

> . . . [18 U.S.C.] § 3593 [ ] requires unanimity for every sentence rendered by the jury regardless of whether the verdict is death, life without the possibility of release, or, if possible under the substantive criminal statute, any other lesser sentence. Life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered. As such, a second

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[9] To be sure, this will not always be the case under § 3594. Many potential death penalty offenses permit alternative penalties of, not only life imprisonment, but also lesser penalties. See, e.g., 18 U.S.C. § 242 (defendant convicted of deprivation of civil rights where death results may be "imprisoned for any term of years or for life ... or may be sentenced to death"); 18 U.S.C. § 844(d) (defendant convicted of killing by explosive "shall be subject to imprisonment to any term of years, or to the death penalty, or to life imprisonment"). The death penalty provisions in 18 U.S.C. § 3591 et seq. were written to accommodate those statutes which do actually permit "lesser sentences" than life imprisonment. Certainly, however, the mention of a "lesser sentence" in the Federal Death Penalty Act was not intended to create a "lesser sentence" option for offenses -- like that at issue here (18 U.S.C. § 1201) -- which expressly permit only death or life imprisonment sentences.

> sentencing hearing would have to be held in front of a second jury impaneled for that purpose. *See* 18 U.S.C. § 3593(b)(2)(C).

Id. at 243; see also id. at 245 ("the Federal Death Penalty Act requires the jury to achieve unanimity or no verdict results").

The Fifth Circuit's conclusion is in violation of the clear language of § 3594, which provides in relevant part as follows: "Upon a [unanimous] recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. **Otherwise, the court shall impose any lesser sentence that is authorized by law.**" 18 U.S.C. § 3594 (emphasis added).

The courts are bound to harmonize § 3593 and § 3594 if they can; and these two provisions can be harmonized in the following fashion: a jury "recommendation" of death or life without release must be unanimous in order for either of these sentences to be imposed on the defendant. The first sentence of § 3594 establishes this. However, in the very next sentence, Congress, by its use of the comprehensive word "[o]therwise," provided that, **in any other eventuality**, "the court shall impose any lesser sentence that is authorized by law." 18 U.S.C. § 3594 cl.2. The case of a deadlocked or hung sentencing jury falls within the second sentence of § 3594. Thus, a deadlocked or hung sentencing jury results in a judge-sentencing of the defendant, not a new sentencing hearing.

The Fifth Circuit's contrary conclusion is not only in violation of the clear language of § 3594; it is also at odds with the only other federal court to have confronted this question. Only a couple of days after the opinion in this case was rendered, the United States District Court for the District of Colorado confronted this very issue in United States v. Terry Lynn Nichols, No. 96-CR-68. In that case, the jury deadlocked as to whether the government had met its burden of proof on the sentencing factors it was required to prove under § 3591(a)(2). After satisfying himself that the jury was hopelessly deadlocked, Chief Judge Matsch dismissed the jury and declared that Nichols

would be sentenced by the court. See Transcript of Proceedings, January 7, 1998, reported at 1998 WL 2518. Chief Judge Matsch held that the jury's failure to achieve unanimity resulted in sentencing by the court. Id. at *4.

The conflict between these holdings of the Fifth Circuit and the United States District Court for the District of Colorado alone warrants this Court's exercise of its certiorari power to decide this case. However, the Fifth Circuit's erroneous conclusion that a deadlocked sentencing jury requires a new sentencing hearing (and does not result in a default sentencing by the court) caused it to decide erroneously another question as to which courts are even more deeply divided.

Because the Fifth Circuit held that nonunanimity would not result in a default life sentence for Petitioner, but rather would result in a "mistrial" and a new sentencing hearing, the Fifth Circuit held that there was no constitutional error in failing to instruct the jury on the consequences of a nonunanimous verdict. Jones, 132 F.3d at 245. The Fifth Circuit noted that in State v. Williams, 392 So.2d 619 (La. 1980) -- on which Petitioner had relied -- the Louisiana Supreme Court had "held that juries must be informed of the consequences of failing to achieve a unanimous verdict." Id.. The Fifth Circuit, however, distinguished that case on the ground that under Louisiana law -- unlike the federal statutes at issue in this case -- a nonunanimous verdict **would** result in a default sentence of life imprisonment. Id.

As pointed out above, this distinction was an erroneous one, since § 3594, as applied in this case, requires that a nonunanimous verdict result in a default sentence of life without release/parole. Thus, this case presents the very issue decided by Williams and a host of other courts. And, a review of that jurisprudence shows that both federal and state courts are deeply divided as to whether the Eighth Amendment requires that a capital sentencing jury be instructed as to the consequences of the failure to reach a unanimous sentencing verdict.

In Williams, the Louisiana Supreme Court held that the trial judge's failure to instruct the jury that a nonunanimous verdict would result in a life sentence without benefit of probation, parole or suspension of sentence, violated the Eighth Amendment:

> In the present case, the jurors were not fully informed of the consequences of their votes and the penalties which could result in each eventuality. They were not told that, by their failure to decide unanimously, they would in fact decide that the court must impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence. Instead, the members of the sentencing body were left free to speculate as to what the outcome would be in the event there was not unanimity. Under these circumstances, individual jurors could rationally surmise that in the event of disagreement a new sentencing hearing, and perhaps a new trial, before another jury would be required.
>
> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. **Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action. The death penalty was imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.**

Williams, 392 So.2d at 634-35 (emphasis supplied). The opinion then noted that "[t]he effect of the error here involved must be held to be prejudicial. If only one of the twelve jurors was swayed by the failure to inform him fully of the consequence of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed." Id. at 635. Accordingly, the court reversed the sentence of death and remanded for a new penalty trial. Id.

This opinion in Williams has been followed and applied to overturn death sentences in a number of subsequent similar cases in other jurisdictions. See, e.g., People v. Durre, 690 P.2d 165, 174 (Colo. 1984); Whalen v. State, 492 A.2d 552, 562 (Del. 1985); State v. Ramseur, 106 N.J. 123, 308-312, 524 A.2d 188, 282-84 (1987); People v. Drake, 748 P.2d 1237, 1254-60 (Colo. 1988) (applying Durre); State v. Bey, 112 N.J. 123, 177-181, 548 A.2d 887, 914-16 (1988) (applying Ramseur). Other courts have, however, disagreed with the reasoning and holding of Williams, albeit

with often very little counter-reasoning. See, e.g., Evans v. Thompson, 881 F.2d 117, 123-24 (4th Cir. 1989) ("No obligation exists for the trial judge to inform the jury of the ultimate result should they fail to reach a verdict.") (citation omitted), cert. denied, 497 U.S. 1010 (1990); Coulter v. State, 438 So.2d 336, 346 (Ala. Crim. App. 1982) ("we can find no [ ] support for appellant's contention, that a defendant in a capital felony case is entitled to have the jury instructed as to the consequences of a 'hung' jury during its punishment deliberations") (collecting cases from Florida, Mississippi, Tennessee, South Carolina, Virginia, and North Carolina).

This deep division of opinion on this important Eighth Amendment issue requires this Court's resolution. Moreover, several Members of this Court have indicated their interest in very similar issues. See Simmons v. South Carolina, 512 U.S. 154, 172-74 (1994) (Souter, J., concurring, joined by Stevens, J.) (would hold that Eighth Amendment requires capital sentencing juries to be told that a defendant is ineligible for parole)[10]; see also Brown v. Texas, ____ U.S. ____, 118 S.Ct. 355, 355-57 (1997) (opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., respecting denial of writ of certiorari) (noting potential constitutional problems of Texas law prohibiting judges from letting capital sentencing juries know when the defendant will become eligible for parole if not sentenced to death). Therefore, this Court should grant certiorari to answer this important question.

Finally, the Fifth Circuit's decision in this case violates due process, as articulated by this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980). In Hicks, a non-capital case, this Court held that, where a statute invested a jury with the sentencing function, the defendant's sentence violated due process where the sentencing jury was not correctly apprised of the sentencing alternatives available to it. Hicks, 447 U.S. at 346-47. Here, while the sentencing jury was told the

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[10] The plurality opinion in Simmons expressly pretermitted the Eighth Amendment issue. See Simmons, 512 U.S. at 162 n.4.

first two sentencing alternatives in this case -- death or life without release, by their unanimous verdict -- the jury was not told, and did not understand, the critical third sentencing alternative -- life without release or parole, imposed by the judge, as a default resulting from the jury's nonunanimity. Because the jury did not fully understand the full ramifications of its sentencing decisions, Petitioner's death sentence violated due process under Hicks. This constitutes yet another reason for this Court to grant certiorari in this case.

For all of these reasons, this Court should grant certiorari to consider the first question presented, along with all of the listed subsidiary questions thereto, and any other questions fairly presented thereby.

II. Is reversal of Petitioner's death sentence required because a reasonable jury could have erroneously interpreted the jury instructions and verdict forms in this case as stating that failure of the jury unanimously to recommend death or life without release would result in a "lesser sentence" for Petitioner (when, in fact, no lesser sentence was actually available)?

SUBSIDIARY QUESTION: Does the erroneous injection of a nonexistent less-than-life sentencing alternative into the sentencing jury's deliberations violate due process under this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980), and the Eighth Amendment requirement of reliability in capital sentencings?

The damage from the failure affirmatively to instruct Petitioner's sentencing jury on the consequences of nonunanimity (discussed above) was compounded by jury instructions[11] and verdict forms[12] which erroneously suggested to the jury that failure to unanimously agree on a sentence or death or life without release would result in some "lesser sentence" -- when, in fact, no such "lesser sentence" was even legally possible!

The Fifth Circuit agreed that no "lesser sentence" was possible, and, indeed, held that it was error for the District Court to inform the jury of a "lesser sentence" option. Jones, 132 F.3d at 247-48. However, the Fifth Circuit rejected Petitioner's claim that the instructions and verdict forms created at least a reasonable probability that the sentencing jurors would believe that nonunanimity would result in the imposition of a lesser sentence.[13] Id. at 245-46.

The Fifth Circuit's decision is clearly wrong under the well-established jurisprudence of this Court. In a constitutional challenge to capital sentencing instructions, "a defendant need not establish that the jury was more likely than not to have [construed] the instruction" in an unconstitutional manner. Boyde v. California, 494 U.S. 370, 380 (1990). Rather, it is sufficient that Jones show only a "reasonable likelihood," see Boyde, id., that the jury would have understood the consequence of a lack of unanimity to be a "default" to the "lesser sentence" mentioned in the instructions. Put another way, "[i]f [Petitioner's] interpretation is one that 'a reasonable jury could

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[11] The sentencing jury instructions given in this case are set forth in Appendix F.

[12] The completed sentencing verdict forms in this case are set forth in Appendix G.

[13] The Fifth Circuit also rejected Petitioner's separate claim that the injection of the erroneous lesser sentence alternative violated due process under Hicks v. Oklahoma, on the ground that while this was error under Hicks, such error was not "plain," and hence could not be recognized under the plain error rule of Federal Rule of Criminal Procedure 52(b). Id. at 248. Relying on the fact that no court had previously held that the "lesser sentence" alternative of § 3593 was not available where the substantive statute did not provide for such, the Fifth Circuit concluded that the error was not plain. Id.

have drawn from the instructions given by the trial judge and from the verdict form employed in this case,'" and reversal would be required. United States v. Flores, 63 F.3d 1342, 1375 (5th Cir. 1995), cert. denied, ___ U.S. ___, 117 S.Ct. 87 (1996), quoting Mills v. Maryland, 486 U.S. 367, 375-76 (1988). And, of course, in this federal direct appeal of a death sentence, any question about the instructions should be resolved in Petitioner's favor: "In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948).

In this case, there was **at least** a "reasonable likelihood" that the jury in this case could -- and in fact did -- draw the erroneous interpretation alluded to by Petitioner from the instructions and verdict forms in this case. The instructions and the verdict forms in this case gave the jury the fatally erroneous impression that a lack of unanimity as to either death or life without release would result in the imposition of a fictitious "lesser sentence."

Right after referring to the jury's ability to recommend this nonexistent "lesser sentence," the District Court told the jury, "[Y]ou are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. **That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.**" (Emphasis added) The latter sentence certainly implies, if it does not state outright, that the jury's failure to agree on a sentence of death or life without the possibility of release will result in a "default" to the court to impose sentence, and particularly the "lesser sentence" mentioned immediately prior.

Very shortly thereafter, the District Court told the jury, "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." The conspicuous absence of the third

sentencing option thrown out to the jury -- i.e., the "lesser sentence" -- from this statement strongly implies that, in contradistinction to the first two options, the third "lesser sentence" option does **not** require jury unanimity, and hence that option will be the result of nonunanimity.

The same impression is given later in the instructions when the jury was told that "Decision Form B should be used if you **unanimously** recommend that a sentence of death be imposed . . . Decision Form C should be used if you **unanimously** recommend that a sentence of imprisonment for life without the possibility of release should be imposed. Decision Form D should be used if you recommend that some other lesser sentence should be imposed." (Emphasis added) Here again, the requirement of unanimity, explicitly mandated for the death and life without release options, is conspicuously absent from the option of the "some other lesser sentence" presented on Decision Form D. In light of the omission of the word "unanimously" from the last quoted sentence above, there is at least a reasonable likelihood that the jurors in this case interpreted these instructions to mean that the fictitious "lesser sentence" option, unlike death or life imprisonment without release, did not require unanimity --- and that, therefore, the "lesser sentence" option would be the result of a lack of unanimity.

Such a conclusion is bolstered by the verdict forms in this case. Decision Form B states, "[W]e recommend, **by unanimous vote**, that a sentence of death be imposed," and requires each of the twelve jurors to individually sign his or her name thereto. (Emphasis added) Decision Form C states, "We recommend, **by unanimous verdict**, a sentence of life imprisonment without the possibility of release," and again requires each of the jurors to sign the form individually. (Emphasis added) In stark contrast, Decision Form D states "We the jury recommend some other lesser sentence," with absolutely no mention of unanimity, and requires only the signature of the jury foreperson. Again, the explicit requirement of jury unanimity for death or life without release --

coupled with the conspicuous omission of any mention of unanimity in connection with the "some other lesser sentence" -- would certainly lead a reasonable jury to conclude that the "some other lesser sentence" would be the result of a lack of jury unanimity.

The jury in this case was presented with three sentencing options, two of which explicitly required unanimity every time they were mentioned (death or life without release), and one of which did not (the fictitious "lesser sentence" option). Nor was the jury explicitly told that it had the option of selecting none of these options, and remaining deadlocked. Because "juries do not leave blanks and do not report themselves as deadlocked . . . unless they are expressly instructed to do so," Mills v. Maryland, 486 U.S. at 383, it seems at least reasonably likely that the jury in this case believed that (1) it had to select at least one of the options; and (2) that the only option available in the case of nonunanimity was the "some other lesser sentence" option, which might result in Petitioner's eventual release from prison some day.[14]

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[14] In Mills, this Court was confronted with an analogous case. A Maryland capital sentencing jury's verdict form stated: "Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE." The verdict form then listed the mitigating circumstances one by one, each with a blank marked "yes" or "no." The jury was instructed to weigh only those circumstances marked "yes" against the aggravating circumstances. The petitioner contended that this scheme created a risk that the jury would conclude that it could only consider mitigating circumstances if the jury unanimously found those mitigators, in violation of the precepts of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. Particularly, the petitioner argued that "it was probable, or at least reasonably possible, that the jury understood that a 'no' answer on the verdict form represented a failure to find unanimously the existence of the circumstance, rather than a unanimous determination that the circumstance did not exist." Mills, 486 U.S. at 373; see also id. at 371-373.

The Court agreed, holding that it "[could not] conclude, with any degree of certainty, that the jury did not adopt petitioner's interpretation of the jury instructions and verdict form." Mills, id. at 377-78. The Court noted that "nothing in the verdict form or the judge's instructions even arguably is construable as suggesting the jury could leave an answer blank . . . ." Id. at 379. The Court suggested that, under these circumstances, a failure to unanimously find a mitigator would cause the jury to mark "no" rather than leave the answer blank, thus allowing one juror to preclude the other eleven from considering mitigating evidence to spare the defendant's life. Id. at 379-80.

It should also be noted that the defense foresaw this problem and tendered requested instructions which would have dealt with this problem, at least in this case. Particularly, the defense tendered requested sentencing Instruction # 5, which provided, in relevant part, that

> Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.

Instruction # 5 also provided that

> [i]n the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release.

Unfortunately, although the defense orally renewed its request for Instruction # 5 right before closing arguments at the sentencing hearing, the District Court overruled that request.

Under all the circumstances presented here, there is at least a reasonable likelihood that the jury in this case erroneously interpreted the jury instructions and verdict forms to mean that a lack of unanimity would result in an undesirable "lesser sentence" for Petitioner. Indeed, two jurors have stated that the jury in this case **actually** misinterpreted the instructions in the fashion just described.[15]

The same principle is operational here. It is at least reasonably likely that the jury here believed that they were duty-bound to select one of the three sentencing options listed; and that, in the absence of unanimity, the unpalatable "lesser sentence" option would have to be imposed.

[15] These jurors were Christie Beauregard and Cassandra Hastings. Both jurors contacted defense counsel of their own volition. Christie Beauregard's remarks are memorialized in an affidavit prepared by Federal Public Defender investigator Daniel Salazar. Cassandra Hastings herself executed an affidavit. These affidavits are included in Appendices H and I, respectively. Both of these jurors indicated that the jury actually believed that failure to achieve unanimity as to death or life without release would result in a "lesser sentence," which would mean that Petitioner would be released one day. Both Beauregard and Hastings indicated that they changed their votes to death under the erroneous belief that a "lesser sentence" would be the result of jury nonunanimity. Before the jury's consideration of this erroneous premise, the jury was divided 8-4 in favor of the

The erroneous interpretation of the jury instructions and verdict forms in this case gave the death-prone jurors a big stick to wield over the heads of those jurors leaning toward a life sentence. The (in reality nonexistent) threat of nonunanimity resulting in a less-than-life sentence effectively coerced the life-leaning jurors into voting for a death verdict to avoid the more unpalatable (but yet actually nonexistent) option of a less than life sentence.[16] Effectively, the jury was forced into "a false choice between sentencing [Petitioner] to death and sentencing him to a limited period of incarceration." Simmons v. South Carolina, 512 U.S. 154, 161 (1994).

Because Petitioner's interpretation is one that "a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case," reversal of Petitioner's death sentence is required in this case.[17] Mills v. Maryland, 486 U.S. at 375-76. See also Andres v. United States, 333 U.S. 740, 752 (1948) (in federal direct appeal of death sentence, Court held that reversal was required where it was probable that "reasonable men might derive a meaning from the instructions given other than the proper meaning"). This is especially so since "[i]n death cases doubts such as those presented here should be resolved in favor of the accused." Andres, id.

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death penalty, with all but three persons willing at least to consider a life sentence.

[16] Courts have recognized the fearfulness of juries at the prospect "that the defendant may be free to murder again two decades hence." Flores, 63 F.3d at 1369. Cf. O'Dell v. Netherland, ____ U.S. ____, 117 S.Ct. 1969, 1981 (1997) (Stevens, J., dissenting) (recognizing that awareness of availability of life without parole alternative decreases juries' willingness to impose death penalty), Brown v. Texas, 118 S.Ct. at 356 n.2 (recognizing that willingness to impose death penalty decreases as length of parole ineligibility increases).

[17] In addition to all of the foregoing, it must be noted that this was obviously not an easy case for the jury to decide. The verdict of death was rendered only after a day and a half of deliberations, during which the jurors found a significant amount of mitigating evidence to exist.

The erroneous injection of a nonexistent "lesser sentence" alternative -- and the erroneous suggestion that this "lesser sentence" would be the result of jury nonunanimity -- rendered Petitioner's death sentence unreliable and in violation of the Eighth Amendment. Indeed, this Court has taken great pains to stress that the Eighth Amendment is violated by **inaccurate** information about sentencing matters. Compare, e.g., Caldwell v. Mississippi, 472 U.S. 320, 341-43 (1985) (O'Connor, J., concurring in part and concurring in judgment) (casting deciding vote, Justice O'Connor concluded that death sentence violated Eighth Amendment where prosecutor gave sentencing jury a misleading and inaccurate view of the role of appellate review of death sentences, thereby decreasing jurors' sense of personal responsibility for decision and rendering death sentence unreliable) with Romano v. Oklahoma, 512 U.S. 1, 9-10 (majority op.) & 14-15 (O'Connor, J., concurring) (1997) (no Eighth Amendment violation in informing capital sentencing jury of pre-existing death sentence where that evidence was **accurate** at the time it was admitted) and California v. Ramos, 463 U.S. 992, 1004 (1983) (capital sentencing instruction gave capital sentencing jury **accurate** information about governor's power to commute a life sentence; hence, there was no diminution of the reliability of the sentencing decision required by the Eighth Amendment). And, taking their cue from these decisions, lower courts have similarly condemned under the Eighth Amendment capital sentencing instructions which give the sentencing jury an **inaccurate** view of their sentencing alternatives. See, e.g., Gallego v. McDaniel, 124 F.3d 1065, 1074-76 (9th Cir. 1997); Hamilton v. Vasquez, 17 F.3d 1149, 1159-64 (9th Cir. 1994).

The Fifth Circuit's decision in this case is inconsistent with this Court's unflagging insistence on **accurate** information during capital sentencings and with decisions of other lower courts which have correctly applied the Court's jurisprudence. The erroneous injection of a nonexistent "lesser sentence" alternative in this case -- and the erroneous suggestion that such a sentence would result

from jury nonunanimity -- rendered Petitioner's death sentence unreliable and hence in violation of the Eighth Amendment.[18] Moreover (but relatedly), these errors also violated due process under the doctrine of Hicks v. Oklahoma, since the sentencing jury was not correctly apprised of its sentencing alternatives.

Because of the importance of the Eighth Amendment and due process issues raised herein, and because of the tension between the Fifth Circuit's decision in this case and decisions both of this Court and of lower courts, this Court should grant certiorari to consider the Fifth Circuit's decision in this case.

III. Is reversal of Petitioner's death sentence required where the jury relied upon unconstitutionally vague, overbroad, and duplicative aggravating factors, and the Court of Appeals summarily asserted that these constitutional errors were harmless without explaining how it reached that conclusion?

The jury that sentenced Petitioner relied upon unconstitutional nonstatutory aggravating factors in the weighing process that led to the sentence of death. The nonstatutory aggravating factors that were submitted to, and found by, the jury violated the Eighth Amendment and the Due Process Clause of the Fifth Amendment. The District Court erred in submitting those two factors

[18] These inaccuracies created all of the same problems -- discussed in detail in the preceding argument -- as the district court's refusal affirmatively to inform the sentencing jury that jury nonunanimity would result in a sentence of life without release or parole imposed by the judge, pursuant to 18 U.S.C. § 3594. Indeed, these are two sides of the same coin. In the first question presented, Petitioner complains of the withholding of correct information from the jury; in the second question presented, Petitioner complains of the giving of **incorrect** information to the jury. But whether the sin is one of omission or commission, the result is the same: the jury had inaccurate information, and hence rendered a sentencing verdict which is not reliable, as required by the Eighth Amendment.

to the jury. Indeed, the Court of Appeals held without hesitation that these two nonstatutory aggravating factors were unconstitutionally vague, overbroad, and duplicative. Jones, 132 F.3d at 250-51.

The Court of Appeals, however, did not reverse and remand for a new sentencing hearing. Instead, the Court of Appeals purported to "cure" this constitutional error by applying the doctrine of harmless error. Id. at 251-52. In so doing, however, the Fifth Circuit misapplied this Court's precedents. Those precedents are clear and well settled. Because a capital defendant is entitled under the Eighth Amendment to an individualized determination of his sentence, an appellate court in a weighing jurisdiction cannot rely upon the fact that there remain valid aggravating factors in order to automatically affirm a death sentence. Rather, "when the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the ... appellate court ... must actually perform a new sentencing calculus, if the sentence is to stand." Richmond v. Lewis, 506 U.S. 40, 49 (1992).

Moreover, a "bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion," Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring), because the Eighth Amendment requires "a detailed explanation based on the record" to support a finding of harmless error. Clemons v. Mississippi, 494 U.S. 738, 753 (1990). The Fifth Circuit's conclusion is precisely such a bald assertion, lacking any explanation of the actual reweighing performed by the court. In addition, the only explanation the court did give as to its reasoning indicates that the court applied an "automatic affirmance" rule based upon two valid aggravating factors.

This Court should grant certiorari to correct such an obvious and blatant disregard of its precedents. More important, however, than the opportunity to correct an obvious error in one case

is the fact that this is the first case in the nation tried and appealed under the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et seq.). The Fifth Circuit's opinion in this case will doubtless be cited and relied upon in the many subsequent cases that have been and will be tried under this statute. This Court sits not only as a court of constitutional error, but also as the supervisor of the lower federal courts. Accordingly, this Court should not let stand such a blatant misapplication of its precedents on the proper application of harmless error.

This case also presents the opportunity to resolve the question left open by this Court in prior cases as to "the degree of clarity with which [an] appellate court must reweigh in order to cure an otherwise invalid death sentence." Richmond v. Lewis, 506 U.S. at 48. Additionally, this case squarely presents the issue, implicit in many previous holdings, as to whether the bald assertion of "harmless error" in the absence of "any principled explanation of how the court reached that conclusion" satisfies the requirement of individualized sentencing. See Sochor v. Florida, 504 U.S. at 541 (O'Connor, J., concurring).

A. The Jury Relied upon Unconstitutionally Vague, Overbroad, and Duplicative Aggravating Factors in the Weighing Process that led to the Sentence of Death.

The Eighth Amendment principles relevant to this case are well settled. The Federal Death Penalty Act of 1994 is a "weighing" statute. Under such a capital sentencing scheme, the sentencer must balance each aggravating factor proven and found to exist against each mitigating factor proven and found to exist. The jury is instructed that it may sentence the defendant to death only if all the aggravating factors found to exist outweigh all the mitigating factors.

If a statute uses aggravating factors to determine who shall be eligible for the death penalty or who shall actually be sentenced to death, the factors cannot be "of vague or imprecise content"

such that they fail to channel the sentencer's discretion. Stringer v. Black, 503 U.S. 222, 237 (1992). "[A] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty," Richmond v. Lewis, 506 U.S. 40, 46 (1992) (citations omitted), and "fails adequately to inform juries what they must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). "An aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). Additionally, if the sentencer "could fairly conclude that an aggravating circumstance applies to **every** defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 507 U.S. 463, 474 (1993) (emphasis in original).

In this case, the two nonstatutory aggravating factors found by the jury were:

> 3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.
> 3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense.

Essentially, the jury was asked to "find" the victim's "personal characteristics" and her "background", and to weigh those purported aggravating factors in the balance. Those factors were not "aggravating," as required by the Eighth Amendment, because they do not separate this homicide from the many other homicides in which the death penalty is not imposed. Nor did they guide or channel the jury's discretion in the weighing process the jury was required to perform to determine the sentence. Even worse, these vague and overbroad factors were impermissibly weighed **twice** in the decisional process. The Eighth Amendment does not allow the sentencer to consider overlapping and duplicative aggravating factors, because weighing the same factor twice in the sentencing calculus necessarily skews the balance toward death's side of the scale.

Aggravating factors play a critical role in a weighing scheme like the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et seq.) In addition to narrowing the class of defendants eligible for the death penalty, aggravating factors in weighing jurisdictions are crucial in guiding the jury's decision on whether to impose the death penalty. Stringer v. Black, 503 U.S. 222, 234 (1992). Under a weighing statute, the jury may only consider those statutory and nonstatutory aggravating factors for which notice has been provided to the defendant; no other information may be brought to bear in the sentencing determination.

Because of the critical role played by aggravating factors in a weighing statute, such a statute may not use factors that fail to guide the sentencer's discretion. A vague or imprecise aggravating factor "creates [a] risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 235. A death sentence imposed under a weighing statute that was based in part on an invalid aggravating factor may not be affirmed automatically. "An automatic rule of affirmance in a weighing state would be invalid . . . for it would not give defendants the individualized treatment that would result from the actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons v. Mississippi, 494 U.S. 738, 752 (1990). In sum, the use of an invalid aggravating factor in the weighing process "creates the possibility not only of randomness but also of bias in favor of the death penalty," because the side of the scale tipping in favor of death is made heavier by the weight of each aggravating factor found by the jury. Stringer v. Black, 503 U.S. at 236.

B. The Court of Appeals Did Not Cure This Constitutional Error

Where, as here, a sentencer relies upon an unconstitutional aggravating factor or factors, the sentence itself is unconstitutional and must be reversed, unless the reviewing court corrects the

constitutional error. This may be accomplished either by the appellate court's reweighing of the valid aggravating factors against the mitigating evidence (ignoring the invalid aggravating factors), or by the appellate court's application of harmless error analysis. Clemons v. Mississippi, 494 U.S. 738, 741 (1990). It is not sufficient merely to recite the formula for harmless error. Rather, because the Eighth Amendment entitles the defendant to individualized treatment, the appellate court must "actually perform a new sentencing calculus." Richmond v. Lewis, 506 U.S. 40, 49 (1992). That new sentencing calculus necessarily requires the appellate court to perform a reweighing of the mix of mitigating and aggravating factors.

The Court of Appeals in this case purported to apply harmless error analysis. However, the court neither "made a detailed explanation based upon the record," Clemons, 494 U.S. at 753, nor offered "a principled explanation for how the court reached that conclusion." Sochor, 504 U.S. at 541 (O'Connor, J., concurring). At a minimum, such a new sentencing calculus requires a detailed explanation of how it engaged in the reweighing and of how much weight it assigned to each aggravating and mitigating factor. Several state supreme courts, particularly since this Court's decision in Clemons, have experience in this kind of analysis. For example, the Tennessee Supreme Court has held:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravating factor, and the nature, quality and strength of mitigating evidence.

State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993), cert. denied, 510 U.S. 1215 (1994).

The Fifth Circuit's explanation fell far short of this standard. Indeed, in the one paragraph in which it discussed whether the error was harmless, the court emphasized that the two statutory

aggravating factors found by the jury were valid. The court appeared to hold that because there were two valid aggravating factors, the sentence itself was necessarily valid. The court stated:

> [I]f the jury had failed to find at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore the ability of the jury to recommend the death penalty hinged on a finding of at least one statutory aggravating factor. Conversely, jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty.

United States v. Jones, 132 F.3d 232, 252 (5th Cir. 1998).

This is remarkably similar to Clemons, where the opinion of the Mississippi Supreme Court was ambiguous as to whether the court had actually reweighed. Some language of the court's opinion seemed to indicate that the court had engaged in proper appellate reweighing. Other language, however, indicated that the court had affirmed solely because there remained one valid aggravating factor to support the death penalty verdict. This Court held that although the Mississippi court's opinion did not necessarily indicate that no reweighing was undertaken, "the court's statement can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. If that is what the Mississippi Supreme Court meant, then it was not conducting appellate reweighing as we understand the concept." Clemons, 494 U.S. at 751-52.

It is true that the Court of Appeals used the phrase "harmless error," and the court stated that the death sentence would have been imposed "had the invalid aggravating factors never been submitted to the jury." However, the court did not actually perform a new sentencing calculus. The most obvious indication is the court's failure to even mention the mitigating factors proved by the defendant and found by one or more jurors. A new sentencing calculus would have required the court to weigh the two remaining aggravating factors against the mitigating factors. Indeed, the court

did not discuss the mitigating evidence at all--other than a bare reference to "the eleven mitigating factors found by one or more jurors." This Court held in Clemons that:

> because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of the defendant's mitigating evidence.

Clemons, 494 U.S. at 752.

This case is quite similar, except that the Fifth Circuit's opinion is not "virtually silent" with respect to the particulars of the mitigating evidence; the opinion is **completely silent** with respect to the particulars of Petitioner's mitigating evidence.

In point of fact, there was an extraordinary amount of mitigating evidence in this case -- as powerful and compelling a case in mitigation as the courts ever see in a capital case.[19] Petitioner served his country honorably and courageously for twenty-two years in the United States Army, retiring with an honorable discharge as a Master Sergeant in the Army Airborne Rangers. He served with distinction in two foreign wars, and was awarded a Meritorious Service Award and a Commendation Medal. Unlike the typical capital defendant, Petitioner had no criminal record. Moreover, Petitioner had overcome a horrible and traumatic childhood, which included regular sexual and physical abuse, and against overwhelming odds he managed to lead a successful and productive adult life. Finally, the defense offered compelling expert testimony of brain damage and psychiatric and psychological disorders, which were unleashed by the emotional trauma of

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[19] Cf. State v. Howell, 868 S.W.2d 238, 262 (Tenn. 1993) (in conducting harmless error analysis, emphasizing that there was no mitigating evidence of defendant's good character), cert. denied, 510 U.S. 1215 (1994).

Petitioner's final break with his ex-wife Sandy, and which combined to severely impair Petitioner's ability to control his impulses on the night of the murder.[20]

Petitioner was entitled under the Eighth Amendment to have this mitigating evidence considered in the weighing process that led to his sentence. Because the Court of Appeals mentioned none of this evidence in its summary conclusion that the evidence was harmless, the Court of Appeals did not perform the type of "new sentencing calculus" required by the Eighth Amendment.

C. The Record Does Not Support a Finding That the Sentence Would Have Been the Same Absent the Two Unconstitutional Aggravating Factors

The failure of the Court of Appeals to articulate the basis of its conclusion that the error was harmless requires reversal. The sentence of death cannot be affirmed absent a real and principled weighing of the remaining valid aggravating factors against all the mitigating factors.

Moreover, the problem is more than one of insufficient articulation by the Court of Appeals. Had the Court of Appeals actually conducted a new sentencing calculus, the record in this case simply could not support a finding beyond a reasonable doubt that a properly instructed jury, not relying upon the two invalid aggravating factors, would have reached the same decision. Several facts reveal that this was a close and difficult decision for the jurors. First, the jury's findings as to the aggravating factors submitted by the government indicate that the jury's decision was anything but a foregone conclusion. The jury refused to find that Petitioner committed the offense after substantial planning and premeditation (Aggravating Factor 2(D)); it refused to find that he knowingly created a grave risk of death to one or more persons in addition to the victim

[20] The importance of Sandy Lane in triggering the tragic chain of events in this case can hardly be understated. Indeed, as previously noted, seven jurors "wrote in" Sandy as a mitigating circumstance in this case. And, as also noted, Tracie McBride bore a strong physical resemblance to Sandy Lane.

(Aggravating Factor 2(B)); and the jury refused to find that Petitioner constitutes a future danger to the lives and safety of other persons (Aggravating Factor 3(A)).

Even with the two invalid aggravating factors weighed in the balance, the decision was difficult and close. The jury deliberated for a day and a half. The affidavits included in Appendices H and I provide a window into how difficult and close the decision was. And, as shown above, and as found by the Fifth Circuit, the jury was instructed erroneously that there was a lesser sentence than death or life imprisonment available. This error further skewed the deliberations, and makes it especially difficult to rely upon the jury's actual verdict to speculate whether a properly instructed jury would have reached the same decision.

Thus, on this record, it is simply not possible to conclude beyond a reasonable doubt that the jury would have sentenced the defendant to death without the submission of the two invalid aggravating factors. Accordingly, the proper remedy on this record is not to remand to the Court of Appeals to conduct a proper harmless error analysis. Instead, the case should be remanded for a new sentencing hearing before a jury.

D. The Fact That the Two Invalid Aggravating Factors Were "Nonstatutory" Does Not Render Them Any Less Harmful

The Court of Appeals seemed to assume that because the invalid aggravating factors were nonstatutory, those factors could not play a large role in the jury's deliberations. Contrary to the court's implication, nonstatutory aggravating factors can have a profound impact in a federal capital case, because they are weighed alongside statutory aggravating factors in the decision between life and death. Petitioner's jury was instructed that it **must** weigh each aggravating factor that it found in the weighing process. In this weighing process, jurors may choose to assign greater weight to a

nonstatutory aggravating factor than to any or all of the remaining statutory aggravating factors and mitigating factors in the case.

The basis for nonstatutory aggravating factors is in 18 U.S.C. § 3593(c). After listing several "statutory" aggravating factors, the statute provides: "The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists." The invalid aggravating factors in this case were "nonstatutory;" that is, they do not appear in the list of aggravating factors in 3593(c); they were drafted by the prosecutor pursuant to the purported authority of the sentence quoted above. That statute provides no guidance to the prosecutor for the formulation of nonstatutory aggravating factors.

Whatever the constitutionality of such a delegation of power to the prosecutor, the facts of this case starkly reveal how such power can be abused. Unlimited authority in the prosecutor to draft aggravating factors for particular cases can lead to arbitrary and unreliable capital sentencing. If the power to draft vague and duplicative aggravating factors is not limited, there is nothing to stop a prosecutor from outlining a closing argument, and then turning the topic sentence of each paragraph of the argument into a separate aggravating factor to be "found" by the jury. The jury would then be told that it must weigh each of those purported aggravating factors in its deliberations.

The fact that the two invalid aggravating factors in this case were duplicative and overlapping makes harmless error analysis especially inappropriate. Not only was an invalid aggravating factor weighed in the balance, as in Sochor, Clemons, Richmond, Stringer, and other cases, the invalid factor was weighed **twice** in this case. The Constitution does not allow the prosecutor to skew the weighing process in this manner.

The Court of Appeals correctly held that the nonstatutory factors drafted by the prosecutor in this case were unconstitutionally vague, overbroad, and duplicative, and that the jury's reliance

upon these factors constituted constitutional error. Unfortunately, the Court of Appeals mistakenly assumed, without any basis, that the nonstatutory aggravating factors were not significant in the jury's deliberations. That conclusion was erroneous. Because the Federal Death Penalty Act of 1994 gives authority to prosecutors to draft nonstatutory aggravating factors to fit the facts of particular cases, nonstatutory aggravating factors will play a large role in prosecutions in death penalty cases in federal court. This Court should, in its supervisory power over lower federal courts, find this constitutional error harmful and reverse the judgment of the Court of Appeals.

For all of these reasons, this Court should grant certiorari to consider this question presented, along with any other questions fairly presented thereby.

IV. Does the Fifth Circuit's opinion in this case comply with the requirements of 18 U.S.C. § 3595?

SUBSIDIARY QUESTION: Under § 3595, must each issue raised by a death-sentenced individual be individually and specifically addressed in the written opinion of the Court of Appeals?

The foregoing issues are important ones which certainly merit this Court's exercise of its certiorari power. However, this Court may wish to pretermit consideration of these issues at this time, in light of a procedural flaw with the opinion and judgment below -- namely, the Fifth Circuit's failure to comply with 18 U.S.C. § 3593(c)(1) and (c)(3).

The Federal Death Penalty Act of 1994 (FDPA) (codified at 18 U.S.C. §§ 3591-3598, see Appendix C), lays down strict requirements for appellate review of death sentences handed down under that Act. See 18 U.S.C. § 3595. Of particular interest in this case, § 3595 mandates that "[t]he court of appeals **shall** address **all** substantive and procedural issues raised on the appeal of a sentence of death . . . .," 18 U.S.C. § 3595(c)(1); and further mandates that "[t]he court of appeals **shall** state in writing the reasons for its disposition of an appeal of a sentence of death under this section." 18 U.S.C. § 3595(c)(3).

In this case, Petitioner filed an appellate brief with 18 issues, many of which had various subparts. Nevertheless, the Court of Appeals in its written opinion specifically addressed only four of these issues. The Court of Appeals did state that it had "consider[ed] all the issues raised by the defendant on appeal." Jones, 132 F.3d at 237; see also id. at 252 (court referenced the fact that it had "consider[ed] the eighteen issues raised by the appellant on appeal"). However, except for Issues I, III, IV, and V, the Court of Appeals did not specifically address or discuss these issues in its written opinion.

Petitioner filed a petition for rehearing by the panel, arguing, among other things, that the opinion of the Court of Appeals did not comport with the requirements of 18 U.S.C. § 3595(c)(1) and (c)(3). However, the Court of Appeals summarily denied rehearing. See Appendix B.

It is clear that, under 18 U.S.C. § 3595(c)(1) and (3), a reviewing court of appeals must not only (1) address every issue raised by a person sentenced to death under the FDPA; but must also (2) state its reasons for deciding any such issue or issues in writing. It also seems clear that at least part of the reason for the "full opinion" requirement of § 3595(c)(1) and (c)(3) was to facilitate this Court's review of death sentences imposed under the FDPA -- a review which is doubly important

because this Court is sitting not only as a court of constitutional error, but also as the supervisor of the lower federal courts.

In this regard, it is appropriate to notice the important role which this Court has assigned to appellate review in upholding the constitutionality of death penalty schemes. See, e.g. Gregg v. Georgia, 428 U.S. 153, 206 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."); Parker v. Dugger, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."). Indeed, the United States District Court for the Southern District of New York has only very recently relied on the "full opinion" requirements of § 3593(c)(1) and (c)(3) to find that the FDPA provides the type of "meaningful appellate review" found "crucial" in Gregg and Parker. See United States v. Frank, ____ F.Supp. ____, 1998 U.S. Dist. LEXIS 6369 ** 56-57 (S.D.N.Y. May 6, 1998).

And this Court has itself noted that its own "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). That duty is frustrated by summary denials of claims by the Court of Appeals, which leave the basis for that court's decision shrouded in mystery.

In sum, by enacting 18 U.S.C. § 3595(c)(1) and (3), Congress decreed that a reviewing court of appeals must not only (1) address every issue raised by a person sentenced to death under the FDPA; but must also (2) state its reasons for deciding any such issue or issues in writing. These requirements were not met in this case.

Furthermore, as a practical matter, only this Court can interpret and enforce the requirements of § 3595, because this Court is the only Court above the federal courts of appeals to whom these

requirements are directed. The proper interpretation and enforcement of § 3595 is essential to the proper functioning of the FDPA and the administration of justice generally. Therefore, this Court should grant certiorari in this case; and thereafter should vacate the present opinion and judgment of the Fifth Circuit and remand with instructions (1) to write an opinion addressing all of Petitioner's issues, in compliance with 18 U.S.C. § 3595(c)(1) and (c)(3); and (2) to enter judgment in conformity therewith.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

IRA R. KIRKENDOLL
Federal Public Defender
Northern District of Texas

BY: Timothy Crooks
TIMOTHY CROOKS
Asst. Federal Public Defender
600 Texas Street, Suite 100
Fort Worth, Texas 76102-4612
(817) 978-2753
LA State Bar No. 17541

Timothy W. Floyd by Timothy Crooks
TIMOTHY W. FLOYD
Texas Tech University School of Law
18th & Hartford
Lubbock, Texas 79409
(806) 742-3982
TX State Bar No. 07188405